IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 965

SAMUEL B. JOHNSTON, *Petitioner,*

v.

BOARD OF DENTAL EXAMINERS, D. C., et al.,
Respondents.

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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DIVISION OF PRINTING—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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STATEMENT OF THE CASE

The facts are sufficiently stated in the petition and will not be repeated.

SUMMARY OF ARGUMENT

Paragraph (d) of Section 11 of the District of Columbia Dental Act of 1940 is copied almost verbatim from the Oregon Dental Law of 1933, the constitutionality of which was sustained by this court in the case of Semler v. Oregon State Board of Dental Examiners, 294 U. S. 608.

Advertising by members of the learned professions, of which dentistry is one, may be absolutely prohibited, since advertising results in unethical competition. Therefore, it follows there can be no constitutional objection to a statute prohibiting dentists from

advertising other than by a modest professional card or the display of a modest window or street sign.

It is immaterial whether the prohibited advertising be true or false.

The power vested in the Board to designate the size of cards and signs necessarily includes the authority to designate the number thereof, as otherwise the limitation as to size would be a nullity. The word "size" must be construed to mean "aggregate size".

The regulations of the Board are reasonable and were so found to be by the court below.

ARGUMENT

I

Paragraph (d) of Section 11 of the District of Columbia Dental Act of 1940 is constitutional.

Paragraph (d) of Section 11 of the District of Columbia Dental Act, approved July 2, 1940, 54 Stat. 716, 718, (Sec. 2-311, D. C. Code, 1940 Ed., Petitioner's brief p. 4) is copied almost verbatim from the Oregon dental law of 1933, the only difference between the two being in the clause relating to solicitors and publicity agents which is not material here, as petitioner does not make use of solicitors or press agents. The constitutionality of the Oregon law was attacked in the case of *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, by a dentist who was engaged in practices strikingly similar to those followed by the petitioner here. Referring to the allegation of the complaint in that case, this court said:

> "Plaintiff alleged in his complaint that he was licensed in 1918; that he had continuously advertised his practice in newspapers and periodicals, and by means of signs of the sort described in the amended statute, and that he had employed advertising solicitors; that in his advertisements he had represented that he had a high degree of efficiency and was able to

perform his professional services in a superior manner; that he had stated the prices he would charge, had offered examination of prospective patients without charge, and had also represented that he guaranteed all his dental work and that his dental operations were performed painlessly. He further alleged that the statements in his advertisements were truthful and were made in good faith; that by these methods he had developed a large and lucrative practice; that through long training and experience he had acquired ability superior to that of the great majority of practicing dentists; that he had been able to standardize office operations, to purchase supplies in large quantities and at relatively low prices, and thus to establish a uniform schedule of charges for the majority of operations; also that he had made contracts for display signs and for advertisements in newspapers, and had entered into other engagements, of which he would be unable to take advantage if the legislation in question were sustained, and, in that event, his business would be destroyed or materially impaired."

This court sustained the validity of the statute, saying:

"The state court defined the policy of the statute. The court said that while, in itself, there was nothing harmful in merely advertising prices for dental work or in displaying glaring signs illustrating teeth and bridge work, it could not be doubted that practitioners who were not willing to abide by the ethics of their profession often resorted to such advertising methods 'to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them.' The legislature was aiming at 'bait advertising.' 'Inducing patronage,' said the court, 'by representations of "painless dentistry," "professional superiority," "free examinations," and "guaranteed" dental work' was, as a general rule, 'the practice of the charlatan and the quack to entice the public.'

"We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing

> with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards."

It is plain that petitioner relies upon the force of his advertising to secure a large proportion of his practice, instead of relying upon a reputation for professional honesty, integrity, skill and ability. He has placed upon his building four signs, 4 feet by 6 feet in size, on which there is lettering 4, 5 and 8 inches in size, as well as a large metal sign hung at an angle, designed for illumination, but no longer illuminated. He also spends from $2500 to $6000 a year for newspaper advertising. (Finding of Fact No. 1 Rec. p. 14) Petitioner further testified that he quit advertising for about 6 months and his business fell off 50 per cent. (Stenographic Transcript, p. 17.) These facts demonstrate that advertising, as said by this court in the *Semler* case, is a practice "which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous."

The United States Court of Appeals for the District of Columbia, in deciding this case, said (Rec. p. 19):

> "The courts have so often sustained identical legislative provisions that we are somewhat surprised at

appellant's apparently serious re-presentation of this argument here."

II

Advertising by dentists, even if truthful, may be regulated or prohibited.

Petitioner contends that a regulation or prohibition of honest and truthful advertising is violative of the due process clause of the Constitution. We are here dealing with advertising by members of one of the learned professions (*Graves* v. *Minnesota,* 272 U. S. 425) and not with the advertising of "traders in commodities". But even truthful advertising of certain commodities may be prohibited. (See *Packer Corp.* v. *Utah,* 285 U. S. 105, where a statute prohibiting the advertising of tobacco products on any bill board, street car sign or placard was sustained). Advertising by members of a learned profession may be absolutely prohibited. *Laughney* v. *Mayberry,* 145 Wash. 146, 259 Pac. 17; *Goe* v. *Gifford,* 168 Va. 497, 191 S. E. 783; *Winberry* v. *Hallihan,* 361 Ill. 121, 197 N. E. 552; *Commonwealth* v. *Brown,* 302 Mass. 523, 20 N. E. 2d. 478. If follows that, if all advertising may be prohibited, it is immaterial whether petitioner's advertising be true or false. In the *Semler* case, supra, this court said: (pp. 611, 612)

> "Recognizing state power as to such matters, appellant insists that the statute in question goes too far because it prohibits advertising of the described character, although it may be truthful. He contends that the superiority he advertises exists in fact, that by his methods he is able to offer low prices and to render a beneficial public service contributing to the comfort and happiness of a large number of persons.
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> * * * * *
>
> "It is no answer to say, as regards appellant's claim of right to advertise his 'professional superiority' or his 'performance of professional services in a superior manner,' that he is telling the truth. In framing its

policy the legislature was not bound to provide for determinations of the relative proficiency of particular practitioners. The legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatement. *Booth* v. *Illinois,* 184 U. S. 425, 429; *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 201; *Hebe Co.* v. *Shaw,* 248 U. S. 297, 303; *Pierce Oil Corp.* v. *Hope,* 248 U. S. 498, 500; *Euclid* v. *Ambler Realty Co.* 272 U. S. 365, 388, 389."

See also

Sherman v. *State Board of Dental Examiners,* (Tex. Civ. App.) 116 S. W. 2d 843.
Levine v. *State Board of Registration,* 121 N. J. L. 193, 1 Atl. 2d. 876.
Craven v. *Bierring,* 222 Iowa 613, 269 N. W. 801.

III

The regulations promulgated by the Board are valid.

(a) Petitioner contends that the Board is without authority to provide that a licensee may not publish more than one professional card in a copy of any newspaper or publication at one time and is also without authority to provide that the licensee may not display more than two signs on his building. Subparagraph 3 of paragraph (h) of Section 11 of the Dental Act (Petitioner's brief p. 4) prohibits "advertising by any medium other than the carrying or publishing of a modest professional card or the display of a modest window or street sign at the licensee's office," and provides that "the size of said cards or signs shall be designated by the Board." It will be noted that the statute permits only "a modest professional card" or "a modest window or street sign". Therefore if the Board acted without authority in any particular it was in permitting two signs upon the dentist's premises when the statute seems

to contemplate only one. But even assuming, for the sake of argument, that the words "a modest professional card" or "a modest window or street sign" can be construed to include the plural, certainly Congress, in requiring the Board to designate the size of the cards and signs, did not intend to do a vain thing. If a dentist could plaster his whole building with signs, or if he could fill a whole page of a newspaper with his business cards, without number, the limitation as to size would be a nullity.

It is well settled that statutes will not be given a literal construction if such a construction would produce an absurd or futile result.

In the case of *Haggar Co.* v. *Helvering,* 308 U. S. 389, 394, this court construed the words "first return" to include an amended first return, saying:

> "All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided, when they can be given a reasonable application consistent with their words and with the legislative purpose. Hawaii v. Mankicki, 190 U. S. 197; United States v. Katz, 271 U. S. 354; Sorrels v. United States, 287 U. S. 435, 446; Burnet v. Guggenheim, 288 U. S. 280, 285; Armstrong Co. v. Nu-Enamel Corp., 305 U. S. 315, 332-3."

In the case of *Armstrong* v. *Nu-Enamel Corp.,* 305 U. S. 315, 333, this court said:

> "Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law."

If Congress did intend that more than one sign could be permitted or more than one professional card could be inserted in a single edition of a newspaper, then the statute can only be given force and effect by construing the word "size" to mean "aggregate size".

The power of the Board to make regulations is not limited

to the power granted in subparagraph 3 of paragraph (h) of Section 11, but additional authority is found in Section 2 (Sec. 2-302 D. C. Code, 1940 Ed.) which provides in part "The Board shall make and adopt such rules and regulations not inconsistent herewith as it deems necessary to effect the purposes of this Act, * * *". Certainly a limitation of the number of signs and the number of professional cards is necessary to effect the purposes of the Act. As before pointed out, if the number of signs and the number of cards is not limited, the purpose of the Act with respect to size is defeated.

(b) Petitioner further contends that the size of the signs and advertisements prescribed in the regulations is not reasonable. The trial court found to the contrary (Finding of Fact No. 4, Rec. p. 15). The only limitations placed by the statute upon the size of the cards and signs to be designated by the Board is that the card must be modest and that the sign must also be modest and not a large display or glaring light one. While the statute defines in general terms the maximum size of the sign and card it does not fix the minimum. It may be that had the Board prescribed signs and cards so small as to amount to none at all the contention might be sustained that the regulations went beyond the power conferred by the statute. But that is not the case here. Signs which are flush with the building may be 6 inches high and 4 feet long. If the length is less, the height may be greater, provided the sign does not exceed 288 square inches in area. The lettering thereon may be 3 inches in height. Signs which protrude from the building, either perpendicular thereto or at an angle, may be 6 inches high and 2 feet long. If the length be reduced, the height may be increased, provided the sign is not in excess of 144 square inches. The lettering may be 3 inches in height. The professional business card which may be published may be 2¼ inches in width and 1 inch in height.

Bearing in mind that Congress limited the Board only with respect to the maximum of the sizes of the signs and cards to be permitted, and bearing in mind further that Congress could have prohibited all advertising by dentists, it is submitted that the sizes prescribed are not unreasonable.

Petitioner further contends that the regulations of the Board are invalid because they lay down a general rule applicable to all. He argues that there should be a separate regulation for each particular case, taking into consideration the locality of the dentist's office, the size of the building and the nature of the obstructions to the view thereof. Congress plainly intended that the Board designate the size of the signs by a general regulation and not by the exercise of discretion in each particular case. Even if, which we do not concede, petitioner's signs are not harmful because of the various factors upon which he relies, this would not invalidate the regulation.

In the case of *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 389, this court said:

> "Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this Court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. Hebe Co. v. Shaw, 248 U. S. 297, 303; Pierce Oil Corp. v. City of Hope, 248 U. S. 498, 500. The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity."

In the case of *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204, this court said:

> "The existence of this power, as the authorities we have cited abundantly demonstrate, is not to be denied simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat."

Since the trial court found (Finding of Fact No. 4, Rec. p.

15) that "The size of letters fixed by the Board of Dental Examiners are readily visible from the street and the signs sufficient in number", it cannot be said the regulations of the Board are arbitrary. It is, therefore, immaterial whether the Board could, without violating the prohibitions contained in the Act, have permitted signs of the size and number used by petitioner.

CONCLUSION

In considering the questions raised in this case the court must consider the purpose and intent of Congress as expressed in Section 10 of the Act (Sec. 2-310, D. C. Code, 1940 Ed.). This section reads as follows:

> "Sec. 10. The practice of dentistry in the District of Columbia is hereby declared to affect the public health and safety and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified dentists be permitted to practice dentistry in the District of Columbia. All provisions of this Act relating to the practice of dentistry shall be construed in accordance with this declaration of policy."

For the reasons above given it is respectfully submitted that the Act here under consideration is constitutional; that the regulations promulgated thereunder are reasonable and valid, and that the petition for writ of certiorari should be denied.

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